

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re K.S. et al., Persons Coming Under the  
Juvenile Court Law.

STANISLAUS COUNTY COMMUNITY  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

D.S.,

Defendant and Appellant.

F059042

(Super. Ct. No. 510568 & 510569)

**OPINION**

**THE COURT\***

APPEAL from orders of the Superior Court of Stanislaus County. Nancy B. Williamsen, Commissioner.

Kristin Bryce Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County Counsel, for Plaintiff and Respondent.

-ooOoo-

---

\* Before Cornell, Acting P.J., Gomes, J., and Poochigian, J.

D.S. (mother) appeals from orders terminating parental rights (Welf. & Inst. Code, § 366.26) to her twin daughters.<sup>1</sup> The trial court issued its termination orders at a continued section 366.26 hearing, which mother did not attend. She contends the trial court violated her due process rights because notice of the continued section 366.26 hearing was not mailed to the address she previously designated for mailing purposes. On review, we conclude any error was harmless and affirm the termination orders.

### **PROCEDURAL AND FACTUAL HISTORY**

The twins were born in late May 2007 at 29 weeks' gestation and required lengthy neonatal care. The healthier of the two was released from the hospital to mother's care after approximately eight weeks. The other twin, who was considered medically fragile, remained hospitalized for the first three and a half months of her life. She was diagnosed with Down Syndrome in addition to a heart condition and respiratory problems. Even after her September 2007 hospital release, the medically fragile twin required twice-a-day oxygen treatments and was much more susceptible to illness.

Barely a month after the medically fragile twin's hospital release, mother left the twins in a car with the motor running. Around the same time, mother was evicted from her apartment after failing to pay several months of rent. From that point on, she could neither manage the money she received nor obtain stable housing for herself and the twins. Mother also lost oxygen tanks necessary for the one twin's physical well being. Although respondent Stanislaus County Community Services Agency (the agency) offered mother voluntary services starting in October 2007, mother repeatedly declined the offers of help. Meanwhile, she had a history of substance abuse, mental health issues, and domestic violence in her relationship with the twins' father.

---

<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Under these circumstances, the agency detained the twins in December 2007 when they were six months old and initiated the underlying dependency proceedings based on mother's neglect. The twins have been placed out of mother's care ever since.

Particularly troubling from the outset was mother's profound lack of insight into and denial of her substance abuse as well as her inability to provide adequate care for the twins. Further investigation revealed mother also had two teenage children who were not in her custody. She lost custody of one of those children in 2006 due in part to her substance abuse.

In February 2008, the Stanislaus County Superior Court exercised its dependency jurisdiction over the twins, adjudged them juvenile dependents and removed them from parental custody. The court expressly questioned mother's credibility. She was very evasive and it was quite difficult to get a straight answer from her. Whether she was intentionally being evasive or it was a medical or mental health issue, the court did not know. Nevertheless, the court gave minimal credibility to mother's testimony. Mother repeatedly interrupted and argued with the court during its ruling to the point that the court ordered mother removed from the courtroom.

Despite more than 12 months of extensive reunification services for mother, she was unable to reunify with either twin. At best, mother maintained regular weekly visits for two hours with the twins. These visits for the most part were monitored, if not supervised. According to reports from July 2008 and February 2009, mother expressed love and care to the twins and was very attentive. Mother also attended most of the twins' medical appointments. However, mother periodically was very disruptive and had outbursts of anger during the medical appointments. This made it quite challenging at times for the medical providers and the foster parents to care for the twins.

At an April 2009, 12-month status review hearing, the court found mother had not made significant progress toward alleviating or mitigating the causes necessitating the

twins' out-of-home placement. The court once again noted mother's evasiveness and lack of credibility. In any event, the court found it would be dangerous to return the twins to mother. The court further found mother failed to demonstrate the capacity to complete the objectives of her case plan. In turn, the court terminated reunification services for her but continued services for the father. The court also reduced mother's visitation with the twins from once a week to once a month.

In addition, there was evidence that the twins' foster parents required protection from mother. Consequently, the court issued a three-year restraining order preventing any contact between mother and the foster family. The agency had placed the twins with these foster parents in April 2008. Since then, the twins developed and shared a positive and loving relationship with the entire foster family. The court declared the foster parents the twins' de facto parents in January 2009.

By July 2009, the twins' father was no longer making any progress towards reunification and could not stay clean and sober. The twins in the meantime made significant developmental and physical health progress due to the consistent care they received from their foster parents. As a result, the agency recommended the court terminate all reunification efforts and set a section 366.26 hearing to select and implement a permanent plan for each of the twins.

In early July 2009, mother petitioned to reopen reunification services. She alleged she was reengaged in her case plan. The court summarily denied mother's petition.<sup>2</sup> Around the same time, mother's counsel filed a Notification of Mailing Address form,

---

<sup>2</sup> Mother appealed the trial court's ruling. (*In re K.S. et al.*, (Mar. 4, 2010, F058158) [non pub. opn.].) This court affirmed the trial court's decision, noting mother's petition did not make a prima facie showing of either changed circumstances or that the proposed change was in the twins' best interests. (*In re K.S. et al.*, *supra*, F058158 at pp. 8-10.)

noting a recent change of mother's mailing address to one we will refer to as the "Riverside address."

At a July 2009 hearing, the court terminated reunification services for the father and set an October 15, 2009, section 366.26 hearing to select and implement a permanent plan for the twins. The court also ordered the parents, both of whom were present, to appear at the section 366.26 hearing. It further directed the agency to serve the parents notice of the section 366.26 hearing by first-class mail. The court confirmed that mother wanted her mail sent to the Riverside address. Within days, the agency served mother at the Riverside address with notice of the section 366.26 hearing.

In the interim, both the agency's social worker and a court-appointed special advocate (CASA) submitted reports to the court recommending that the court terminate parental rights. The CASA report noted each twin was very, if not extremely, attached to the foster parents. The medically fragile twin continued to make remarkable progress in her foster care placement. She also required more attention than a typical 28-month-old child from caregivers. She was in the best possible environment for her to thrive, both now and in the future. Her twin sister was also doing very well in the foster home.

The social worker's report contained the following information relevant to this appeal. First, the social worker listed an address for mother, different from the Riverside address. We will refer to this different address as the "Finlandia address." Also, the social worker reported the parents were separately visiting the twins on a monthly basis. All visits were supervised by agency social workers and no major concerns were observed during any of the visits.

In addition, the social worker identified the foster parents as the twins' prospective adoptive parents given the lengthy period of time the twins had lived in the foster home and the foster parents' commitment to adoption. The social worker noted the foster parents and the twins were highly bonded with one another and that the twins referred to

the foster parents as mommy and daddy. In particular, the foster parents had been successfully meeting the medically fragile twin's special needs. Both twins appeared very comfortable and happy in the care of the foster parents.

When the court called the section 366.26 hearing on October 15, 2009, mother's counsel asked for a brief continuance. Counsel advised the court that she spoke to mother the preceding day and mother intended to testify. However, counsel received information from the father that mother entered "the hospital last night with some kind of blood issue." Giving mother the benefit of the doubt, the court found good cause to continue the hearing to October 28, 2009. It also directed counsel to provide "a note or something from mother's doctor for other counsel to confirm the veracity of her statements."

The following exchange then occurred.

"THE COURT: As to mother's address for purposes of mailing a continued hearing notice, [Mother's counsel], does your client still wish to receive mail at the Finlandia address?

"[MOTHER'S COUNSEL]: That's the last information I have, your Honor.

"[SOCIAL WORKER]: She confirmed with me a couple weeks ago the Finlandia address for her."

The next day the social worker mailed mother notice to the Finlandia address of the continued section 366.26 hearing date.

On October 28, the court called the matter once more. Mother was again absent. The court asked counsel whether she had the doctor's note. Mother's counsel did not.

Counsel explained that she called mother "the day after the [last] hearing informing her of the Court's request." Mother's counsel left a message because there was no answer when she called mother and also sent mother a letter the same day with

the same information. On October 27, counsel once again called, left a message on mother's phone, and received no response from mother.

The court found proper notice had been given for the October 15 hearing and proper notice was sent to mother for the continued hearing date. It also noted for the record that it had read and considered the social worker's assessment and the CASA report prepared for the section 366.26 hearing. As the court inquired whether the attorneys had any additional evidence or argument to offer, mother's counsel requested a further continuance. She added she had no information as to why mother was absent or when she would be available.

The court denied this further continuance for lack of good cause or any information as to when mother would be present. The court added it was concerned:

“at the last hearing that mother's claim of illness was perhaps not a valid claim and so ordered -- not suggested, but ordered, that the mother was to provide a doctor note in support of that, which she has not done so. The Court finds no good cause to continue and denies the request.”

Thereafter, the court found by clear and convincing evidence that the twins were likely to be adopted. It then terminated parental rights.

## **DISCUSSION**

Mother contends the court violated her due process rights by proceeding with the October 28 section 366.26 hearing in her absence. She argues she did not receive notice of the continuance because it was not mailed to the Riverside address, which she had previously designated as her mailing address. According to mother, this amounted to a structural error so as to render the termination order reversible per se or in the alternative the error was not harmless beyond a reasonable doubt. We disagree, as discussed below.

### ***A. No Good Cause Shown for the Continuance***

Mother overlooks the conditional nature of the continuance the court granted. When mother was absent on October 15, the court expressly gave her the benefit of the

doubt in finding good cause for the continuance of the section 366.26 hearing. The court had reason to suspect, however, that counsel's claim -- based on the father's hearsay that mother was at the hospital the previous night -- was invalid. Mother's history of evasiveness certainly supported the court's suspicion. The court therefore conditioned its continuance of the section 366.26 hearing on mother producing a doctor's note confirming the hospitalization claim. Mother's counsel in turn left messages on mother's telephone on both October 16 and 27 about the need for the doctor's note, but to no avail. Mother did not return her attorney's calls and did not provide her counsel with a doctor's note for the October 28 hearing.

Under these circumstances, there was no good cause showing made for the prior continuance. When a parent is absent without good cause at a properly noticed hearing, which the October 15 section 366.26 hearing was, the court is entitled to proceed in the parent's absence. (*In re Christopher A.* (1991) 226 Cal.App.3d 1154, 1162.) Therefore, without proof to support the hospitalization claim, the court was entitled to proceed as it did in mother's absence. (*Ibid*; *In re Angela C.* (2002) 99 Cal.App.4th 389, 395 [had the court proceeded on the originally scheduled hearing date, as it had every right to do with respect to mother, that hearing would have been uncontested in that she failed to attend the hearing as originally noticed or notify anyone as to her position].)

### ***B. No Due Process Violation***

In any event, mailing the notice of continuance to the Finlandia address was not a due process violation. Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (*In re Angela C., supra*, 99 Cal.App.4th at p. 393.) Proof of actual notice to the parent of the continued hearing date will suffice for due process purposes. (*Ibid.*) The record in this case includes a proof of service by mail to mother of the continuance.



The fact that the notice was not mailed to the Riverside address, which mother previously designated for mailing purposes, does not mean there was a due process violation. Mother's counsel, who prepared the prior notification of mailing address, told the court on October 15 that the Finlandia address was the latest information she had for mother. Similarly, the social worker informed the court that mother recently confirmed with him the Finlandia address as hers. In other words, the Finlandia address was mother's most recent and therefore last known address to her attorney and her social worker. Mailing the notice of the continuance to a parent's last known address satisfies due process in that it was reasonably calculated to provide such notice. (*In re Angela C.*, *supra*, 99 Cal.App.4th at p. 393.) Mailing the notice of the continuance to mother's last known address also satisfied the statutory requirement for notice of a continued section 366.26 hearing. In this regard, section 294, subdivision (d) provides "subsequent notice for any continuation of a Section 366.26 hearing may be by first-class mail *to any last known address*, by an order made pursuant to Section 296, or by any other means that the court determines is reasonably calculated, under any circumstance, to provide notice of the continued hearing." (Italics added.) Section 294, subdivision (d) does not mandate notice to the address listed in a notification of mailing address when there was more current information as to a parent's last known address.

### ***C. Harmless Error***

Even if we were to determine there had been a good cause showing made for the continuance and that the court in an abundance of caution should have ordered the continuance mailed to the Riverside address as well, we still would conclude the error was harmless. (*In re James F.* (2008) 42 Cal.4th 901, 916-920; *In re Angela C.*, *supra*, 99 Cal.App.4th at p. 391.)

Mother contends had she attended the section 366.26 hearing she could have testified that she and the twins shared a beneficial parent/child relationship such that

termination would be detrimental to the twins (§ 366.26, subd. (c)(1)(B)(i)). We have no doubt she might have argued the point. However, that does not mean she was prejudiced. Applying even a harmless beyond a reasonable doubt standard (*In re Angela C.*, *supra*, 99 Cal.App.4th at p. 391) to the facts of this case, we can find no resulting prejudice to mother.

At the section 366.26 permanency planning stage, children have a fundamental independent interest in belonging to a family unit and they have compelling rights to be protected from abuse and neglect and to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) Adoption gives a child the best chance at a full emotional commitment from a responsible caretaker. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) The statutory presumption is that termination and permanency through adoption is in the child's best interests and therefore not detrimental. (§ 366.26, subd. (b); *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1344.)

Section 366.26, subdivision (c)(1)(B), acknowledges termination may be detrimental to a dependent child under specifically designated and "compelling" circumstances. (*In re Celine R.*, *supra*, 31 Cal.4th at p. 53.) One of those circumstances is when a parent has maintained regular visitation and contact and the child would benefit from continuing the relationship to such a degree that the child would be greatly harmed by termination. (§ 366.26, subd. (c)(1)(B)(i); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 [beneficial relationship exception].)

Here, mother did maintain regular visitation with the twins. However, in order for the beneficial relationship exception to apply, the parent/child relationship must promote the child's well-being to such a degree that it outweighs the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) A juvenile court must balance the strength and quality of the

parent/child relationship in a tenuous placement against the security and the sense of belonging that a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated. (*In re Lorenzo C.*, *supra*, 54 Cal.App.4th at p. 1342; citing *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

There was never any evidence in the preceding 22 months of these dependency proceedings that either twin had a substantial, positive emotional attachment with mother. At most, the undisputed evidence was that mother expressed love and care to the twins and was very attentive during their visits. However, even that is not compelling proof of detriment. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953-954 [a parent must demonstrate more than pleasant visits or loving contact].) In addition, the agency, which was required to periodically report on the twins' status (§ 365), never reported that the twins showed any signs that they missed mother or otherwise experienced any emotional difficulties attributable to any attachment to mother.

This comes as no surprise given that the twins were detained when they were six months old and had been hospitalized for a significant portion of that first six months. Thereafter, they shared at most weekly visits with mother.

In addition, the undisputed evidence -- while mother still attended the court hearings -- was that the twins shared a positive and loving relationship with the foster parents. The twins had been placed with these foster parents more than a year earlier and the foster parents had since been declared the twins' de facto parents. The twins also made significant developmental and physical health progress due to the consistent care they received from their foster parents.

Further, the court in April 2009 reduced mother's visits to once-a-month. There was never any argument, let alone evidence, by mother or the children's counsel that reduced visitation somehow would harm, or in fact did harm, the children.

Finally, we note that had mother testified at the section 366.26 hearing, as she argues she would have, she would have had to overcome a serious credibility hurdle with the trial court. The trial court on at least two occasions made a record of declaring mother was not credible.

Given all of these circumstances, we conclude mother was not prejudiced by any error attributable to the continuance. We are satisfied beyond a reasonable doubt that mother could not have prevailed had she claimed the beneficial relationship exception. (*In re James F.*, *supra*, 42 Cal.4th at pp. 916-920; *In re Angela C.*, *supra*, 99 Cal.App.4th at p. 391.)

#### **DISPOSITION**

The orders terminating parental rights are affirmed.